

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Raymond Saxton,

Petitioner,

v.

Redwood County,

Respondent.

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FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-captioned matter came on for hearing before Administrative Law Judge Allen E. Giles commencing at 9:30 a.m. on May 10, 1995 at the Redwood County Courthouse in Redwood Falls, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated March 29, 1995. The record closed on June 12, 1995, when the last brief was filed.

James R. Anderson, Attorney at Law, P.O. Box 1196, Marshall, Minnesota 56258, appeared on behalf of the Petitioner, Raymond Saxton. Robert D. Tiffany, Redwood County Attorney, P.O. Box 130, Redwood Falls, Minnesota 56283, appeared on behalf of Redwood County ("Respondent" or "the County").

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner of Veterans Affairs, 20 West 12th Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUES

1. Whether the Petitioner was entitled to notice of his right to a veterans preference hearing under Minn. Stat. § 197.46 (1992) before his position was reduced to half-time.
2. Whether the County violated the Veterans Preference Act by failing to award preference points in any of Petitioner's three applications for positions with the County.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is an honorably discharged veteran of the United States Air Force. He was on active duty from November 20, 1963, through November 17, 1967.

2. On or about May 2, 1988, Petitioner began working for the County as a Landfill Operator at the Redwood County Landfill on a full-time basis.

3. The Redwood County Landfill ceased accepting mixed municipal waste on February 9, 1994. On June 2, 1994, the Minnesota Pollution Control Agency (MPCA) informed Redwood County that only demolition debris could be accepted at the Redwood County Landfill from May 16, 1994, to May 1, 1995. Exhibit 1. The MPCA required that the landfill close for all purposes on May 1, 1995.

4. On October 31, 1994, the County reduced Petitioner's hours to sixteen hours per week. The reason given to Petitioner was that the landfill was no longer receiving any waste other than demolition debris and there was not enough work to justify keeping Petitioner working full-time. Petitioner used his accrued vacation time to maintain his status as a full-time employee.

5. Petitioner advised his supervisor on January 30, 1995, that the next day would be Petitioner's last day of work. Petitioner and the County agreed that Petitioner would receive full-time pay until February 22, 1995, and retain full benefits until the end of February, 1995.

6. On March 1, 1995, Petitioner received a letter from the County indicating that his position was being eliminated and that he would be laid off, effective May 1, 1995. Exhibit 13. The reason given for the layoff was the closure of the county landfill. Id. Attached to the letter were notices of Petitioner's rights under the Veterans Preference Act for both the layoff and any termination that could ensue from the layoff. Petitioner did not perform any work for the County after February, 1995.

7. On July 6, 1994, Petitioner applied for the position of Highway Maintenance Worker with the County, based in Lucan, Minnesota (Lucan Position). No veteran's preference points were added to the scoring done by the County of the twenty-two applicants for the position. On July 19, 1994, Petitioner was informed by letter that he was one of six finalists for the Lucan Position. Petitioner interviewed for the position on August 1, 1994. Petitioner was not hired for the Lucan position.

8. On October 25, 1994, Petitioner applied for the position of Highway Maintenance Worker with the County, based in Wabaso (Wabaso Position). Four applications were received for the Wabaso Position and none were interviewed. The County Board chose not to fill the position. Exhibit 7.

9. On December 20, 1994, Petitioner applied for the position of Highway Maintenance Worker with the County, based in Redwood Falls (Redwood Falls Position). Thirty-five persons applied for the Redwood Falls Position. Six applicants were interviewed and Petitioner was considered as a finalist but not required to appear for an interview, since he had recently interviewed for the Lucan Position. Petitioner was not hired for the Redwood Falls Position.

10. The County follows a two-stage hiring process. The first stage rates applicants to arrive at a group of finalists. All of the finalists are qualified for the position. The successful applicant is chosen from amongst the pool of finalists.

11. In March, 1995, Petitioner filed a petition with the Commissioner of the Minnesota Department of Veterans Affairs. In his petition he complained that he was forced to resign his employment with the County and had not been given notice of his right to a hearing for a demotion (when he was reduced from full-time to 16 hours per week). Petitioner asserted that the County had not afforded him veterans preference in hiring as required by the veterans preference act.

12. The Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing on March 19, 1995, setting this matter on for hearing before Administrative Law Judge Allen Giles on May 10, 1995.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have authority to determine if the Petitioner was removed from his employment without notice of his right to a hearing under the Veterans Preference Act pursuant to Minn. Stat. §§ 197.481 and 14.50 (1992).

2. The Department complied with all relevant substantive and procedural requirements of statute and rule.

3. The County received timely and proper notice of the hearing and the claims asserted by Petitioner.

4. Petitioner is an honorably discharged veteran for purposes of Minn. Stat. §§ 197.447 and 197.46 (1992).

5. Under Minn. Rules pt. 1400.7300, subp. 5 (1993), Petitioner has the burden of proof to establish that he was removed from his employment in violation of Minn. Stat. § 197.46.

6. The County reduced Petitioner's hours from full-time to sixteen hours per week due to a lack of work to be performed. The County acted in good faith and the reduction does not constitute a demotion or removal.

7. The County did not add points to Petitioner's scores on his applications for the Redwood Falls Position or the Lucan Position. The County did automatically include Petitioner amongst the candidates who passed the application testing phase, and Petitioner was interviewed for both positions.

8. The hiring process used by the County violates the requirements of Minn. Stat. § 197.455.

9. Petitioner was not injured by the County's violation of Minn. Stat. § 197.455, since he received interviews for both the Redwood Falls Position and the Lucan Position and was considered on an equal basis with all other finalists.

10. Since no one was hired for the Wabaso Position, there is no violation of the Veterans Preference Act with respect to the hiring process for that position

11. Petitioner voluntarily resigned his employment as of January 31, 1995, and therefore he had no right to a hearing under Minn. Stat. § 197.46.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED: That the Commissioner of the Minnesota Department of Veterans Affairs dismiss the Petitioner's Petition with prejudice.

Dated this _____ day of July, 1995.

ALLEN E. GILES
Administrative Law Judge

Reported: Taped; four tapes

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

In this proceeding the Petitioner has alleged that the County violated Minn. Stat. § 197.46 by demoting him, and then constructively discharging him, without informing him of his right to a hearing under the Veterans Preference Act. The statute, which governs the removal of veterans, states, in part, as follows:

. . . No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

Minn. Stat. § 197.46.

One exception has been judicially recognized to the hearing requirement under the Veterans Preference Act. Where the veteran's position is eliminated due to abolishment of the position, no hearing is required. State ex rel. Boyd v. Mattson, 197 N.W. 30 (1923). The same rule applies to reductions in hours. Under this exemption, the County was not obligated to provide Petitioner with a veterans preference hearing at either the time of his reduction of hours or when Petitioner voluntarily left his employment with the County on January 31, 1995.

The exemption for elimination of the veteran's position is inapplicable where the abolition is made in bad faith. State ex rel. Caffrey v. Metropolitan Airports Commission, 246 N.W.2d 637, 642 (Minn. 1976). Bad faith is demonstrated where the duties of the veteran's position are performed by nonveterans after the position is abolished. Id. In this matter, the MPCA had directed the County to close the County Landfill by May 1, 1995. Only demolition debris was being accepted when Petitioner's hours were reduced. There is no evidence that any of Petitioner's duties were being performed by other workers when Petitioner's hours were reduced. There is no basis for concluding the County acted in bad faith.

Another method of demonstrating bad faith is categorizing the veteran as ineligible to return to work, but not affording the veteran the right to a hearing. That form of bad faith is apparent in Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987). In Myers, the veteran was placed on a leave of absence from which he could return if his medical condition improved. The Minnesota Supreme Court held that the City's action amounted to a discharge which triggered the veteran's notice and appeal rights. Id. at 850-851. Petitioner argues that the reduction of hours amounts to a constructive discharge. This argument overlooks the requirement that the action be taken in bad faith before notice and appeal rights are triggered. There has been no showing of bad faith in this case.

The County maintains that it is only required to award veterans preference points when "open, competitive examinations" are given. The County asserts that the application process followed for the Lucan Position and Redwood Falls Position does not fit that mold. That issue was resolved in Hall v. City of Champlin, 463 N.W.2d 502, 504 (Minn. 1990), where the Minnesota Supreme Court said:

.... the Legislature did not, by its use of the words, "open competitive examination" intend to restrict application of veterans preference

The Supreme Court went on to require that all political subdivisions use a 100-point scale for hiring to ensure that compliance with the Veterans Preference Act can be determined.

The County did not use a 100-point preference scale in the hiring process for either the Lucan Position or the Redwood Falls Position and this violates the Veterans Preference Act. However, to fashion a remedy, Petitioner must have been harmed. For both positions actually filled, Petitioner was included amongst the finalists. In the hiring

method approved by the Minnesota Supreme Court in Hall, applicants are ranked by score, with any preference points added, and the highest scoring candidates are interviewed (or otherwise assessed) to determine who will fill the open position. The preference is granted in the initial scoring, not in the final interview. Thus, if a veteran is included amongst the finalists granted interviews, there is no more preference to be granted. McAfee v. Department of Revenue, 514 N.W.2d 301, 305 (Minn. App. 1994). In this matter, Petitioner was interviewed for the Lucan Position and that interview was applied to the Redwood Falls Position. There is no injury to Petitioner and, therefore, no remedy. Petitioner's complaint should be DISMISSED.

AEG